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NTSB Order No. EA-3762

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 28th day of December, 1992

_____	)	
THOMAS C. RICHARDS,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-10608
v.	)	
	)	
CLARENCE L. PATTERSON,	)	
	)	
Respondent.	)	
_____	)	

**OPINION AND ORDER**

The Administrator appeals from the oral initial decision of Administrative Law Judge John E. Faulk, issued in this proceeding on June 20, 1990 at the conclusion of an evidentiary hearing.<sup>1</sup> The law judge reversed an order of the Administrator revoking respondent's air carrier certificate for his alleged violations

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<sup>1</sup>A copy of the oral initial decision, an excerpt from the transcript, is attached.

of Part 135 of the Federal Aviation Regulations (FAR), 14 C.F.R. Part 135.<sup>2</sup> The only issue before us on the Administrator's appeal is whether the law judge erred in concluding that the evidence did not prove that the respondent had operational control over certain flights with respect to which he rented an aircraft to a company, Eastern Metro Express, that supplied its own pilot. For the reasons discussed below, we deny the Administrator's appeal and affirm the initial decision of the law judge.

The Administrator asserts here, as he did at the hearing, that the respondent did not have an "arm's length relationship" with the two pilots named in the order of revocation, and that, therefore, the flights they performed for Eastern Metro Express took place under the respondent's 135 certificate, not under Part 91 of the FARs. We disagree. Aside from a showing that respondent and the pilots shared some office space and facilities, there appears to be no evidence that the pilots were subject to respondent's influence in any way concerning the flights they performed for Eastern Metro Express. The relationship between Eastern Metro Express and the respondent was essentially a rental agreement under which the respondent would make a plane available on a steady basis. When Eastern Metro needed to transport parts or a mechanic, it would make its own

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<sup>2</sup>The Administrator alleged violations of FAR sections 135.5, 135.95, 135.293(a), 135.293(b), 135.299, and 135.343.

arrangements for a pilot.<sup>3</sup> Later, the pilot and the respondent would bill the company separately. We agree with the law judge that this evidence simply does not show operational control by the respondent of the Eastern Metro Express flights.<sup>4</sup>

Another reason offered by the Administrator for finding the law judge's decision in error is that some individuals within Eastern Metro Express believed that they were getting air transportation rather than a rental. While the Board has considered such a factor in connection with determining whether certain flights were made for compensation or hire, *see, e.g., Administrator v. Southeast Air*, 4 NTSB 517 (1982), we do not think that this type of evidence is particularly relevant to the resolution of control issues.

In sum, the Administrator has not, on appeal, offered a persuasive reason to disturb the judgment of the law judge that the respondent had not been shown to have had operational control of the flights alleged in the complaint. The Board, therefore, adopts the findings and conclusions of the initial decision.

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<sup>3</sup>Eastern Metro Express apparently could choose any pilot who met the qualifications of the insurance policy on the aircraft.

<sup>4</sup>The Administrator states repeatedly that the fact that the company using the planes paid with separate checks for the plane and the pilot does not suffice to take the operation out of the realm of section 135. The Board agrees. However, neither does the "two check routine" indicate guilt. In addition, the law judge specifically indicated that his decision was not based solely on the existence of the separate billing.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The Administrator's appeal is denied; and
2. The initial decision reversing the Administrator's  
order of revocation is affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and  
HAMMERSCHMIDT, Members of the Board, concurred in the above  
opinion and order.